

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 69/2010 OF 16TH DECEMBER, 2010

BETWEEN

NIHON KOGYO SHOJI.....APPLICANT

AND

KENYA PIPELINE COMPANY LTD.....PROCURING ENTITY

Review against the decision of the Tender Committee of the Kenya Pipeline Company Ltd dated 16th December, 2010 in the matter of Tender No. SU/OT/349N/10 for the Supply, Installation and Commissioning of Mainline Pump Sets.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Eng. C. A. Ogut	-	Member
Ms. Judith A. Guserwa	-	Member
Amb. C. M. Amira	-	Member
Mr. Joshua W. Wambua	-	Member

IN ATTENDANCE

Mr. P. M. Wangai	-	Holding Brief for Secretary
Ms. Florence Okumu	-	Secretariat

PRESENT BY INVITATION

Applicant, Nihon Kogyo Shoji

Mr. O. Arwa	-	Advocate, Rachier & Amollo Advocates
Mr. S. Ligunya	-	Advocate, Rachier & Amollo Advocates
Mr. J. Jullius	-	Advocate, Rachier & Amollo Advocates
Mr. N. Gichamba	-	Advocate, Rachier & Amollo Advocates
Mr. Klaas Ooms	-	Director

Procuring Entity, Kenya Pipeline Company Ltd

Mr. M. Matheka	-	Advocate, Kipkenda, Lilan & Koech Advocates
Mr. A. Maguo	-	Advocate, Kipkenda, Lilan & Koech Advocates
Mr. Maitai	-	Engineer
Mr. J. Ludeki	-	Legal Officer
Mr M Gitobu	-	Purchasing Manager

Interested Candidates

Mr. H. Kotecha	-	Uni Supplies & Marketing Ltd
----------------	---	------------------------------

BOARD'S DECISION

Upon hearing the representations of the parties and interested candidates and upon considering the information in all documents before it, the Board decides as follows: -

BACKGROUND

This tender was advertised by the Procuring Entity on 20th and 21st July, 2010 in the Star and Daily Nation Newspapers respectively. The tender was for

Supply, Installation and Commissioning of Mainline Pump Sets Line 1 Third Pump.

Closing/Opening:

The Tender closed and opened on 23rd September, 2010. The tender attracted nine bidders.

1. M/s Lechi mechanical;
2. Bytwise Limited;
3. M/s Uni supply;
4. M/s Hyosung Ebara;
5. M/s Encom Limited;
6. M/s Kobe Kikai;
7. M/s Shabi Boeki;
8. M/s Nihon Kogyo; and
9. M/s Flowserve.

EVALUATION

Tender Evaluation was carried out in three stages namely preliminary, Technical and Financial evaluation stages.

Preliminary Evaluation

The bids were evaluated for responsiveness on the following parameters:

1. Separate Technical and Financial Bid
2. Certificate of Incorporation/ Registration
3. Copy of a valid KRA tax compliance certificate
4. Tender Security
5. Required number of tender copies submitted
6. Pre-tender site visit certificate

7. Manufacturer's Authorization form duly filled

The results of the preliminary evaluation were as follows:

ITEM	DESCRIPTION	Lechi Mecha nical	Byte Wise Ltd	Uni Supply	Hyosung Ebara	Encom Ltd	Kobe Kikai	Shabi Boeki	Nihon Kogyo	Flow Serve
1	Separate Technical and Financial bid	yes	yes	yes	yes	yes	yes	yes	yes	yes
2	Certificate of Incorporation/registration	yes	yes	yes	yes	yes	yes	yes	yes	yes
3	Copy of a valid KRA tax compliance certificate	yes	yes	yes	yes	yes	N/A	N/A	N/A	N/A
4	Tender Security	yes	yes	yes	yes	yes	yes	yes	yes	yes
5	Required number of tender copies submitted	yes	yes	yes	yes	yes	yes	yes	yes	yes
6	Pre-tender site visit certificate	yes	yes	yes	yes	yes	yes	yes	yes	yes
7	Manufacturer's Authorization form duly filled	yes	yes	yes	yes	yes	yes	yes	yes	N/A

All the nine bidders were found to be responsive hence made it to the next stage of evaluation.

Technical Evaluation

The criteria used for determination is as tabulated below.

NO	DESCRIPTION OF CRITERIA	POINTS
1	Provision of Data Sheets, Drawings and Performance Data	50
2	Programme of Supply	10
3	Qualifications of Key Personnel for Commissioning of Mainline Pump sets	15
4	Warranty and After Sales Service	15
5	Training	10
TOTAL		100

Summary of the technical evaluation was as tabulated below:

NO	DESCRIPTION OF CRITERIA	POINTS	POINTS											
			Lechi Mechanical	Bytewise ltd	Uni supply	Hyosung Ebara	Encom ltd	Kobe Kikai	Shabi Boeki	Nihon Kogyo	Flowserve			
1	Provision of data sheets, Drawings and performance Data	50	20	5	0	45	38	38	38	38	38	38	38	46
		%	40	10	0	90	66	90	90	90	90	90	90	82
2	Programme of supply	10	0	0	0	10	7	7	7	7	7	7	7	7
		%	0	0	0	100	70	70	70	70	70	70	70	70
3	Qualification of key Personnel for commissioning of mainline pump sets	15	0	0	0	10	0	0	0	0	0	0	0	0
		%	0	0	0	100	0	0	0	0	0	0	0	66.6
4	Warranty and After sales services	15	0	0	0	15	15	15	15	15	15	15	15	15
		%	0	0	0	100	100	100	100	100	100	100	100	100
5	Training	10	0	0	0	10	7	7	7	7	7	7	7	7
		%	0	0	0	100	100	100	100	100	100	100	100	100
TOTAL		100	20	5	0	90	67	85	85	85	85	85	85	93

In view of the above information, M/S Lechi Mechanical, M/S Bytewise, M/S Uni-supply & M/S Encom were disqualified from further evaluation after scoring below the cut-off score.

M/S Hyosung Ebara, M/S Kobe Kikai, M/S Shabi Boeki, M/S Nihon Kogyo and M/S Flowserve scored above the pass mark of 70% and therefore qualified for the Financial Evaluation.

Financial Evaluation

The financial proposals were opened on 28th October, 2010. The prices quoted by the bidders were as follows:

S/No.	Bidder	Tender Sum	
1.	Kobe Kikai Shoji	Usd. 26, 625, 179.49	2, 144, 147, 004.47
2.	Shabi Boeki Kokai	Usd. 28, 673, 270.15	2, 309, 833.80
3.	Flowserve B. V	Euro. 7, 846, 825.00	892, 409,991.06
4.	Nihon Kogyo	Usd. 21, 504, 952.56	1, 731, 811, 033.62

NB: Exchange Rates

1 USD = Kshs. 80.531

1Euro = Kshs. 113.73

After evaluation, the Evaluation Committee recommended the award of the tender to Flowserve B V Netherlands at its tender sum Euro. 7, 846, 825.00 equivalent to Kshs. 892, 409, 991.06.

In its meeting held on 22nd November, 2010, the tender committee concurred with the recommendations of the evaluation committee and awarded the tender to Flowserve B.V. Netherlands.

Letters of notification of award to both successful and unsuccessful bidders are dated 1st December, 2010.

THE REVIEW

The Request for Review was lodged by Nihon Kogyo Shoji on the 16th of December, 2010 against the decision of Kenya Pipeline Company Ltd, in the matter of tender No. SU/OT/349N/10 for the Supply, Installation and Commissioning of Mainline Pump Sets.

The Applicant was represented by Mr. O. Arwa while the Procuring Entity was represented by Mr. M. Matheka, both are Advocates of the High Court of Kenya.

The Applicant raised three grounds of Appeal and sought for the following orders:-

1. The decision to award the tender for the supply, installation and commissioning of mainline pump sets, project No. SU/QT/349N/10) be annulled.
2. That the tender for the supply, installation and commissioning of mainline pump sets, project No. SU/QT/349N/10) be awarded to the applicant.
3. That in the alternative and without prejudice to the foregoing, the procuring entity be ordered to tender afresh and process the same in a fair and transparent manner.

The Board deals with the grounds of review as follows;

PRELIMINARY OBJECTION BY THE PROCURING ENTITY

At the commencement of the hearing the Procuring Entity raised a Preliminary Objection as follows;

“The Public Procurement Administrative Review Board lacks jurisdiction to entertain this matter by virtue of Section 93(2) (c) of the Public Procurement and Disposal Act No. 3 of 2005. The said provision provides where a contract is signed in accordance to Section 68 of the Act the subject matter shall not be subject to review. In this instant case the Procuring Entity and Flowserve B.V. Netherlands signed a contract arising from the tender under review on 16th December, 2010 in the morning only for the Procuring Entity to be served with the Request for Review on 17th December, 2010. In light of the foregoing this Board lacks jurisdiction to hear this matter”.

In response, the Applicant filed a Replying Affidavit on 12th January, 2011. The affidavit stated that the Applicant was notified of the outcome of the tender by a letter sent to it by way of registered courier on 7th December, 2010 as evidenced by airway bill from DHL courier services. It stated that it received the letter of notification on 17th December, 2010. It therefore argued that the signing of the contract by the Procuring Entity with the Successful Bidder was premature and not in accordance with Section 68 of the Public Procurement and Disposal Act, 2005 (hereinafter “the Act”).

The Board has carefully considered the submissions of the parties together with the documents that were presented which included the letter of notification, the mail register kept by the Procuring Entity, the copies of the

airway bill of the courier company and the contract signed between the Procuring Entity and the Successful Bidder, Flowserve B V. Netherlands.

The Board notes that the letters of notification to the Successful and the Unsuccessful Bidders are dated 1st December, 2010. The Board further notes that the mail register by the Procuring Entity shows that the letters to the Bidders were recorded for delivery on 2nd December, 2010. The entry in the register is not evidence that the letters were dispatched on that day. The Procuring Entity failed to show when the letters were dispatched. That notwithstanding, even if 2nd December, 2010 is considered as the date for dispatch, time for purpose of the appeal window started running on 3rd December, 2010. Therefore, the earliest date the Procuring Entity could sign the contract with the Successful Bidder was on 17th December, 2010. By signing the contract on 16th December, 2010, the Procuring Entity failed to comply with Section 68 (2) of the Act which provides as follows:

“the written contract shall be entered into within the period specified in the notification under section 67(1) but not until at least fourteen days have elapsed following the giving of that notification”.

In view of the foregoing, the Board has jurisdiction to hear and determine this matter on merit as Section 93 (2) (c) of the Act provides that the jurisdiction of the Board can only be ousted where a contract is signed in accordance with Section 68 of the Act. As already observed by the Board, the contract signed on 16th December 2010 was not signed in accordance with the Act. Accordingly, the Preliminary Objection is hereby dismissed and the Board will consider the Request for Review on merit.

Having found that the Board has jurisdiction on the matter, we proceed to deal with grounds of appeal raised by the Applicant as follows:

GROUND 1

This is a general statement that the decision of the Procuring Entity was wrong and unlawful. This statement is not backed by any allegation of breach of the Act or the Regulations. The Board therefore need not make any findings on the allegation.

GROUND 2, 13 AND 15

These grounds relate to the notification of the outcome of the tender award to the Applicant. The Board notes that the Applicant abandoned the grounds at the hearing.

GROUND 3, 4, 5, 6, 7, 8, 9, 10, 11 AND 12

These grounds have been combined as they raise similar issues on whether the Bidder who was awarded the tender met the tender specifications and whether the evaluation was done in accordance with the criteria set out in the tender documents.

At the outset of its submissions the Applicant stated that the technical specifications in the tender documents were clear. It added that it had no complaint regarding the specifications but its main contention was that the Successful Bidder provided pumps that did not meet the specifications as set out in the tender documents.

The Applicant submitted that from the specifications in the Tender Document the Procuring Entity had invited tenders for the Supply, Installation and Commissioning of Mainline Pump sets which would achieve a pump capacity of 880 cubic meters per hour. The Applicant further submitted that prior to the award of the tender, the Procuring Entity operated pumps supplied by it on the Mombasa Pipeline each with a capacity of 405 m³/hr.

The Applicant contended that in the year 2006, the Procuring Entity wanted to increase the pump flow rate capacity to 880 m³/hr. It stated that the Procuring Entity advertised a tender but it advised the Procuring Entity that it would not achieve the flow rate of 880 m³/hr by purchasing the pumps specified in that tender. The Applicant argued that it advised the Procuring Entity that to achieve the flow rate of 880 m³/hr, it ought to increase the impeller sizes of their 440 m³/hr pumps and add a third pump as a standby pump for three of its stations. It argued that by doing so, the Procuring Entity would have two pumps running parallel to achieve a flow rate of 880 m³/hr.

The Applicant further argued that from its advice, the Procuring Entity purchased and installed two pumps each at Samburu, Manyani, Makindu and Konza. The Applicant contended that the tender, the subject of this Request for Review, was aimed at achieving the advice it had given to the Procuring Entity by installing standby pumps at all stations except for station No. 1, namely Mombasa.

In addition, the Applicant stated that its tender met all the technical specifications of the standby pumps but the Procuring Entity awarded the tender to a bidder whose pumps can only deliver 810 m³/hr.

In conclusion, the Applicant stated that pursuant to Section 66 of the Act, the Procuring Entity is required to conduct its evaluation of the tenders on the basis of the specifications in the Tender Documents. It contended that the Procuring Entity acted unlawfully by reducing the capacity specifications and awarding the tender to a bidder who would not provide the pumps meeting the set out specifications. Therefore, the Procuring Entity breached Sections 2 and 66 of the Act.

In response, the Procuring Entity denied all the allegations by the Applicant. It argued that the tender process was fair and transparent and that all the bidders were subjected to the same evaluation process based on the criteria that were set out in the tender documents. The Procuring Entity stated that the pumps provided by the Successful Bidder met all the tender specifications and would achieve the required pump flow as set out in the Tender Document.

The Procuring Entity further submitted that the Applicant did not fill the Bill of Quantities as per the required format in the tender documents. It stated that it is only the Successful Bidder who filled the Bill of Quantities as per the required format in the tender documents.

Finally, the Procuring Entity stated that the issue touching on technical specifications were subject of *Review No. 60 of 2010 between Hyosung Ebara Company Limited and Kenya Pipeline Company Limited* which arose from this tender and therefore issues relating to the technical specifications were Res Judicata.

The Successful Bidder, who had been notified of this Request for Review sent an email dated 13th January, 2010 stating that it would not be able to attend the hearing. Therefore, no submissions were made on its behalf.

The Board has carefully considered the submissions of the parties and the documents that were presented which included the Tender Documents, minutes of the technical and financial evaluations and the letters of notification.

At the outset, the Board notes that this tender was the subject of Review in **Application No 60 2010 of 4th November, 2010 between Hyosung Ebara Company Limited and Kenya Pipeline Company Limited.**

The Board notes that the Request for Review No.60 of 2010, though arising from the same tender under review, was filed by a different bidder, whose main complaint was that its disqualification at the Technical Evaluation stage was unfair. Accordingly, the Board holds that the principle of **Res Judicata** is not applicable in this Request for Review.

The Board further notes that the bone of contention in this Request for Review is the Applicant's contention that it is the only Bidder who had offered pumps that met the technical specifications.

The Board has carefully considered the evaluation report and notes that the tender evaluation was conducted in three stages namely, Preliminary, Technical and Financial Evaluation stages. The Board further notes that out of the nineteen Tenderers that collected the tender documents, only nine submitted their bids. The nine bids were subjected to preliminary evaluation

to confirm compliance with the mandatory requirements and all of them qualified for detailed technical evaluation.

The Board notes that the technical evaluation was to be conducted using the following criteria which were set out in the tender document:

NO	DESCRIPTION OF CRITERIA	POINTS
1	Provisions of Data Sheets, Drawings and Performance Data	50
2.	Programme of Supply	10
3.	Qualifications of Key Personnel for Commissioning of Mainline Pumpsets	15
4.	Warranty and After sales Service	15
5.	Training	10
	Total	100

The Board further notes that results of the Technical evaluation were as follows:

- (i) Lechi Mechanical, Bytewise, Uni-Supply and Encom scored less than the mandatory minimum marks of 70% and they were therefore disqualified from further evaluation.
- (ii) Hyosung Ebara, Kobe Kikai, Shabi Boeki, Nihon Kogyo Shoji and Flowserve attained the pass mark of 70% and were all recommended to proceed to the financial evaluation. At the technical evaluation stage, the Applicant scored 85 % while the Successful Bidder scored 93%.

The Board finds that from the minutes of the Technical Evaluation Committee, the Bidders were subjected to a detailed technical evaluation based on the criteria that were set out in the tender documents. The Applicant, the Successful Bidder and two other bidders met the technical specifications and

attained the minimum qualifying marks and proceeded to the financial evaluation stage.

The Board observes that the Procuring Entity by setting the minimum marks at 70% was satisfied that any bidder who met that score was technically qualified to provide the pumps that would meet its requirements.

The Board notes at this juncture that four bidders excluding Hyosung Ebara which was disqualified on other grounds, proceeded for financial evaluation. Upon opening of the financial proposal the prices quoted by the four remaining bidders, including the Applicant, were as follows:

- (i) Kobe Kakai Shoji - USD 26, 625,179.49 (equivalent of Kshs. 2, 144, 147, 004.47 at the rate of Kshs. 80.530 per dollar).**
- (ii) Shabi Boeki Kakai USD 28, 673, 270.15(equivalent of Kshs. 2, 309, 833.80 at the rate of Kshs. 80.530 per dollar)**
- (iii) Flowserve (Euro 7, 846, 825 (equivalent of Kshs. 892, 409,991.06 at the rate of Kshs. 113.72881 per Euro)**
- (iv) Nihon Kogyo USD 21,204, 952.26 (equivalent to 1, 731, 811, 033.62 at the rate of Kshs. 80.530 per dollar).**

It is therefore clear that the Applicant's price of Kshs. 1, 731, 81, 033.62 was about Shillings Eight Hundred Million higher than the price of Kshs. 892, 409,991.06 offered by the Successful Bidder. Applying the financial formula that was set out in the tender documents, the Applicant would not have

emerged the lowest evaluated Bidder. In the circumstances, the Board finds that the Applicant's price was too high and it failed to win the tender on that basis and that the tender was awarded to the Bidder with the lowest evaluated price.

The Board further finds that the argument by the Applicant that it was the only bidder qualified to supply the pumps on account that it had previously installed the existing pumps has no basis. As the Board has already noted, all the bidders were subjected to a detailed technical evaluation and the Procuring Entity satisfied itself that the pumps offered by the bidders who passed the technical evaluation would meet its requirements. If the arguments by the Applicant are upheld, there would have been no competitive tendering and this would be contrary to the objects of the Act, as set out in Section 2.

Taking into account all the above matters, these grounds fail.

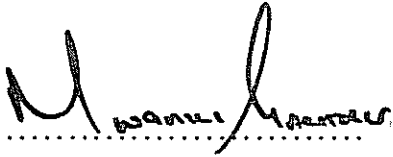
GROUND 14

This was a general ground that the Application sought clarification on the Procuring Entity's decision.

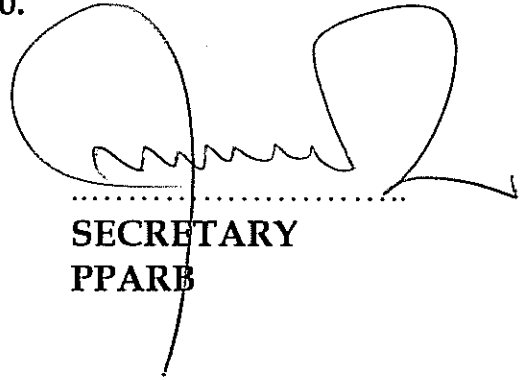
The Board notes that this is a mere allegation and no evidence was adduced before the Board to the effect that the Applicant sought such clarification.

In view of the foregoing, this Request for Review fails and is hereby dismissed. The Board directs that the procurement process may proceed pursuant to Section 98 of the Act.

Dated at Nairobi on this 17th day of January, 2010.



.....
CHAIRMAN
PPARB



.....
SECRETARY
PPARB

